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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

| | | |
|---------------------------|---|----------------------|
| UNITED STATES OF AMERICA, |) | Case 1:15-cv-00833 |
| |) | |
| Plaintiff, |) | |
| |) | |
| ANTHONY GARZIONE, |) | |
| |) | |
| Relator, |) | |
| |) | |
| v. |) | Alexandria, Virginia |
| |) | January 22, 2016 |
| PAE GOVERNMENT SERVICES |) | 9:54 a.m. |
| INC., |) | |
| |) | |
| Defendant. |) | |
| |) | Pages 1 - 25 |

TRANSCRIPT OF DEFENDANT'S MOTION TO DISMISS AMENDED
COMPLAINT PURSUANT TO RULE 12(b)(6) AND 9(b)
BEFORE THE HONORABLE ANTHONY J. TRENGA
UNITED STATES DISTRICT COURT JUDGE

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES:

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1 THE CLERK: Civil Action 1:15-cv-833, *Anthony*
2 *Garzione v. PAE Government Services, Inc.*

3 MR. JARRETT: Good morning, Your Honor. Jack
4 Jarrett for Relator Anthony Garzione.

5 MR. WORKMASTER: Good morning, Your Honor.
6 Jason Workmaster with my colleague, John Sorrenti, for
7 PAE.

8 THE COURT: All right. We're here on a
9 motion to dismiss the amended complaint. I've reviewed
10 the briefing in the case. I'll give counsel an
11 opportunity to explain what they think they need to
12 more adequately explain.

13 MR. WORKMASTER: Thank you, Your Honor. May
14 it please the Court.

15 THE COURT: Yes.

16 MR. WORKMASTER: Your Honor, the relator's
17 amended complaint here does not identify a single
18 invoice that our client submitted to the government
19 that was false on its face, does not identify a single
20 statement that our client made to the government
21 regarding its compliance with the Federal Acquisition
22 Regulation. And so he relies entirely on this implied
23 certification theory of liability of which I'm sure the
24 Court is well aware.

25 THE COURT: Let me just ask a preliminary

1 question.

2 MR. WORKMASTER: Yes, Your Honor.

3 THE COURT: I'm unclear on an aspect of the
4 facts. I know we're proceeding on the basis of the
5 allegations, but the allegations of the complaint
6 allege that the government gave PAE a prime contract
7 and then modified that contract to include the bottled
8 water supplies after the government decided to stop
9 doing that.

10 MR. WORKMASTER: Yes, Your Honor.

11 THE COURT: That modification, at least based
12 on the one exhibit that was submitted, was for water
13 supplies through November 2014. Was there a subsequent
14 modification for the period after November 2014?

15 MR. WORKMASTER: The government did, Your
16 Honor, take contractual action. Whether it was to
17 another mod or another task order, I'm not quite sure,
18 Your Honor, but it did take contractual action to
19 extend that requirement, yes, Your Honor.

20 THE COURT: The notice to proceed that was
21 given to Taylors was within the context of the
22 modification to the prime contract that extended only
23 through the end of November; is that accurate or not?

24 MR. WORKMASTER: I believe that's accurate,
25 Your Honor. I'd have to confirm that, but I believe

1 that's accurate.

2 THE COURT: So to the extent that there was
3 a -- I guess it's just not in the record what direction
4 PAE gave to Taylors with respect to the period after
5 November 2014. Was there a second notice to proceed
6 under a second modification to the prime contract?

7 MR. WORKMASTER: That is not in the record,
8 Your Honor. My understanding of that is that there was
9 a subsequent action, a subsequent action that PAE took
10 with Taylors. Taylors, as I believe we noted in our
11 papers, was an existing subcontractor. They weren't
12 retained just for this bottled water requirement. They
13 had been a subcontractor working for PAE under this
14 contract for some time.

15 THE COURT: Right.

16 MR. WORKMASTER: So whether there was a mod
17 to their underlying subcontract or a separate notice to
18 proceed, I'd have to check on that, Your Honor.

19 THE COURT: Well, the reason I raise it is
20 because one of your arguments is this is simply an
21 increase in the volume of a previously awarded contract
22 to Taylors, but the notice to proceed, if you consider
23 that to be a separately awarded contract, was really
24 within the context of the mod that expired the end of
25 November. So they weren't increasing the volume under

1 that mod; were they?

2 MR. WORKMASTER: May I confer with my
3 colleague for a moment?

4 THE COURT: Yes.

5 (Counsel confer.)

6 MR. WORKMASTER: Yes, Your Honor. As I said
7 before, what our understanding of the facts is, Your
8 Honor, is that that expanded requirement was wrapped
9 into their underlying subcontract that they had already
10 had.

11 THE COURT: With Taylors?

12 MR. WORKMASTER: With Taylors, yes, Your
13 Honor.

14 THE COURT: All right.

15 MR. WORKMASTER: As we noted in our papers,
16 Your Honor, with respect to that longer term
17 requirement, even if the full panoply of regulations
18 that the FAR imposes on conducting a competition, even
19 if those apply, it is perfectly appropriate for PAE to
20 rely upon recently obtained pricing. The short-term
21 award had been completed just a couple of months
22 before. They had received pricing. They had received
23 data from nine bidders. Under the FAR Part 15 of the
24 provision that we cite, FAR 15.403-1, to constitute
25 adequate price competition, you can rely on recent

1 pricing.

2 THE COURT: Now, as alleged by the plaintiff,
3 Taylors was already supplying limited supplies of water
4 under its original contract. Is that right?

5 MR. WORKMASTER: Yes, Your Honor.

6 THE COURT: All right.

7 MR. WORKMASTER: Also, as we noted in our
8 papers, the relator is arguing -- appears to be arguing
9 that this award wasn't proper simply on the basis of
10 price. As we noted in our motion and in our reply
11 brief, the relator concedes that the other -- it does
12 not even allege in his complaint that the other
13 bidders, AWI or Pearl, could meet all of the other
14 requirements, in particular the testing requirement
15 that was imposed by the government for this
16 requirement.

17 It was perfectly appropriate for PAE to take
18 schedule into account. They already had Taylors under
19 contract. It was perfectly appropriate to take that
20 into account in making the award as the relator notes
21 PAE did in paragraph 59 of the amended complaint. It
22 was perfectly appropriate for PAE to take into account
23 that Taylors could meet the testing requirement. The
24 others couldn't as the plaintiff concedes. In order to
25 test the water for these other bidders, they would had

1 to have gone to Taylors at \$1,000 for a ten-pack test.

2 So there were bases upon which to make this
3 award separate and independent from the pricing that
4 was perfectly appropriate in conducting a competition
5 to take effect of the language that they're citing to
6 the maximum practical extent. That gives the prime
7 contractor a lot of discretion in deciding exactly how
8 to make award of a subcontract.

9 You know, as we also noted in our papers,
10 Your Honor, you know, the facts as alleged do not
11 demonstrate a violation of this 52.244-5 provision at
12 all. Again, even under the relator's implied
13 certification theory of liability, he has to identify a
14 violation of something. He hasn't identified a
15 violation of that, of 52.244-5. And because there's no
16 violation of 52.244-5, there also, Your Honor, is no
17 violation of the other provisions he cites. Having --

18 THE COURT: Are you in agreement that PAE
19 was -- I know they had some competitive bidding, but
20 were they, in fact, required to do that given the fact
21 that Taylors was already a subcontractor?

22 MR. WORKMASTER: Your Honor, we would not
23 concede that. We would not concede that.

24 Again, as we noted, this provision of
25 conducting a competition to the maximum extent

1 practical, there's not even been a case that's defined
2 at any point in time exactly what that means. And so
3 in this case, Your Honor, to grant our motion to
4 dismiss, all the Court needs to find is that our
5 position on 52.244-5 and the other Part 31 provisions
6 he cites -- all the Court needs to find is that our
7 position is a reasonable one.

8 If our position is a reasonable one, PAE
9 could not have acted with the requisite *scienter* for a
10 False Claims Act violation. At most, at most, this
11 would be a contract violation. And figuring out
12 exactly what 52.244-5 and 31.201-2 and 3 mean in this
13 context, that could be left for a contract case between
14 the government and PAE -- of course, the government
15 hasn't brought any such case against us -- for a
16 resolution in the Court of Federal Claims or one of the
17 boards of contract appeal. That is not an issue that
18 this Court even needs to resolve with finality to grant
19 our motion. It is simply enough to find that we acted
20 reasonably and, therefore, could not possibly have had
21 the *scienter*.

22 THE COURT: Why don't you speak to the
23 retaliation claim.

24 MR. WORKMASTER: On the retaliation claim,
25 Your Honor, it's simply what we have said in our

1 papers.

2 THE COURT: Your position is really this is a
3 *Keckler* case where there was no objective reason to
4 think there was fraud. So no matter how much he
5 investigated, he couldn't be retaliated.

6 MR. WORKMASTER: That is absolutely correct,
7 Your Honor. Even taking the facts that Mr. Garzione
8 has alleged as true, it adds up to he was complaining
9 about a potential -- something he thought was a
10 contractual problem that was not nearly enough to put
11 PAE on notice that he was about to sue them for fraud;
12 therefore, there could not have been any retaliation
13 against him, Your Honor.

14 THE COURT: Well, I'm looking at the
15 allegations of paragraph 118 which says, "Garzione
16 informed supervisors that PAE was violating its
17 contractual obligation to compete the contract; that
18 Taylors's bid was false when compared with what they
19 actually charged; that PAE and Taylors violated bidding
20 protocols; and repeatedly stated the Department of
21 State was being wrongfully overcharged, perhaps by
22 millions of dollars." What's inadequate about that
23 allegation? Obviously, you don't agree with it.
24 Accepting it as true, what is inadequate about that?

25 MR. WORKMASTER: Well, Your Honor, it in no

1 way indicates -- would have indicated to PAE that this
2 was anything beyond simply an employee who had a
3 concern about a contractual violation.

4 THE COURT: In your view, it has to be
5 construed within the context of the underlying conduct
6 by PAE?

7 MR. WORKMASTER: Absolutely, Your Honor.
8 Absolutely. It was not nearly enough to put us on
9 notice that Mr. Garzione was about to sue us.

10 THE COURT: All right.

11 MR. WORKMASTER: Thank you, Your Honor.

12 THE COURT: Counsel.

13 MR. JARRETT: Good morning, Your Honor. May
14 it please the Court.

15 THE COURT: Good morning.

16 MR. JARRETT: We agree with PAE's counsel,
17 that the key issue in this case is whether PAE's
18 contention that it reasonably believed it was awarding
19 the subcontract to Taylors the best value. If that
20 contention is correct or if our contention that
21 Mr. Garzione's allegations amount to -- that must be
22 taken as true amount to the assertion that PAE was
23 intentionally overcharging the government and, in doing
24 so, knowingly certifying falsely compliance with the
25 prime contractor.

1 THE COURT: Well, that's what I'd like you to
2 focus on. As I understand your theory, it's an implied
3 certification theory, correct?

4 MR. JARRETT: Yes, Your Honor.

5 THE COURT: What specifically were they
6 impliedly certifying?

7 MR. JARRETT: They were certifying -- as the
8 papers lay out, there's a short-term and a long-term
9 contract. They were certifying that the prices they
10 were charging the government were reasonable under
11 the --

12 THE COURT: Well, talk a little bit more
13 about that. Under Part 31, they're entitled to be paid
14 their actual cost and the cost that the contracting
15 officer determines to be reasonable, correct?

16 MR. JARRETT: Yes, sir.

17 THE COURT: So there's no express
18 certification they they've complied with anything, but
19 your theory is that they impliedly were certifying
20 compliance with Part 31?

21 MR. JARRETT: Yes.

22 THE COURT: All right. How do you construe
23 an implied certification within the context of Part 31?
24 I can see where there's an implied representation that
25 you're billing actual cost, but how are you impliedly

1 certifying given the language of Part 31 which
2 centrally says the government will pay whatever costs
3 are reasonable? It doesn't say that the contractor is
4 only submitting actual and reasonable costs. It says
5 it's submitting actual cost and the government will pay
6 those costs to the extent the government determines
7 them to be reasonable. So how does your implied
8 certification theory include an affirmative
9 certification that the actual costs they're submitting
10 is, quote, reasonable?

11 MR. JARRETT: In submitting these claims for
12 payment, they're submitting that they are in compliance
13 with FAR Part 31 and FAR 52, the competition
14 requirement. In saying that we are eligible to receive
15 payment, they are saying that the prices we're charging
16 are reasonable.

17 This is like the *Triple Canopy* case in which
18 they're saying -- they're submitting claims for payment
19 for these guards, in so doing, saying these guards
20 comply with our contractual obligations. What was
21 false about that in that case was that the guards
22 weren't meeting the requirements. In the same way, PAE
23 is certifying that we're entitled to payment because
24 we've complied with our prime contractual duties in
25 selecting subcontractors and charging a reasonable

1 price.

2 THE COURT: All right. Let me pick up on
3 that last point. I understand that PAE, in fact,
4 competitively sourced the bottle requirement, but there
5 was already in place a prime contract to PAE. Then PAE
6 subcontracted Taylors for food supplies which included
7 beverages and, by your own allegations, including some
8 water. I know they did it, but why were they obligated
9 to competitively bid an increase in Taylors' water
10 obligations under its existing subcontract? Why
11 couldn't that have just been done by way of a notice to
12 proceed or a sub-task order or however you want to
13 characterize it?

14 MR. JARRETT: Your Honor, we believe that the
15 requirements of the prime contract when there's a new
16 task order that's so different than the original -- the
17 water supply under just a regular food supplier was a
18 nominal supply as compared with this Defense Logistics
19 Agency.

20 THE COURT: Well, could some competing
21 contractor have protested the modification to PAE's
22 contract on the grounds that the government had an
23 obligation to competitively bid the prime contract for
24 the water?

25 MR. JARRETT: No, Your Honor.

1 THE COURT: There was no competition as to an
2 expansion of the prime contract; was there?

3 MR. JARRETT: Your Honor, I'm not aware that
4 there was.

5 THE COURT: Nor was there a requirement that
6 that be done?

7 MR. JARRETT: I believe that was within the
8 prime contract's provision, that PAE was the prime
9 contractor to provide food and life services.

10 THE COURT: But they weren't providing water?

11 MR. JARRETT: PAE was not providing the
12 entire water supply.

13 THE COURT: Correct. They were providing a
14 little bit of water the way Taylors was providing a
15 little bit of the water?

16 MR. JARRETT: Yes, Your Honor.

17 THE COURT: All right. So when PAE's
18 obligation to increase water was established -- and the
19 government did that on a noncompetitive basis -- why
20 would PAE have an obligation to competitively bid an
21 increase in what Taylors was already doing under its
22 existing subcontract?

23 MR. JARRETT: Because the prime contract with
24 PAE provides that they only receive costs to the extent
25 those costs are reasonable and that --

1 THE COURT: That's a different point.
2 Reasonableness is a different point. I'm talking about
3 the competitive bid point that you've raised, which is
4 FAR 52.

5 MR. JARRETT: Yes, Your Honor. The prime
6 contract also provided that when PAE was granted the
7 award by the government, the government elected to ask
8 for more water from PAE. The government is involved in
9 that decision. They say, PAE, you're our agent in
10 finding -- as the prime contractor, you're our agent in
11 finding more water. One of the protections that the
12 government presents itself when it has these prime
13 contracts is to say, You need to competitively source,
14 and that was a requirement within the prime contract.

15 THE COURT: Well, they competitively bid,
16 presumably, the prime contract to Taylors in the first
17 instance, correct?

18 MR. JARRETT: Yes, Your Honor. I think this
19 is key and this is what differentiates this case from
20 just a person coming in and disagreeing about a
21 contractual provision or two reasonable interpretations
22 of a contractual provision. I think this is what
23 differentiates this case from that, that is that PAE
24 has not told -- has not given a consistent explanation
25 for why -- for either its obligations under the prime

1 contract or why it awarded either of the short-term or
2 long-term awards to Taylors.

3 At first, in the summer of 2014, Taylors
4 acted with a reading of the provision that it had to
5 compete it, and it did that. When Mr. Garzione said,
6 We need to get cheaper prices for the long-term
7 contract, supervisors said, That makes sense to us.
8 Not once during that time -- the argument that Taylors
9 was the best value, Taylors didn't bring that up at
10 that point. They didn't say, No, we don't -- Taylors
11 is the best value. We don't need to compete this. Two
12 months later, they completely reversed course, and they
13 said -- they stopped -- Mr. Garzione provides all of
14 this information showing there's cheaper options out
15 there. They said, Well, we can't compete this because
16 Taylors is our primary food supplier. We're
17 contractually obligated.

18 THE COURT: Was the Pearl bid 5 cents or
19 15 cents less than PAE's? Because at one point it's
20 alleged that it was \$3.50 for 12 bottles, and later
21 it's alleged it was \$3.65.

22 MR. JARRETT: I believe it was \$3.60 at -- I
23 think the bid may have been \$3.50, and then the
24 pricing -- I think when they went for the long-term
25 contract, it may have been \$3.60 and \$3.65 or the

1 reverse of that.

2 THE COURT: All right.

3 MR. JARRETT: Your Honor, if I may,
4 Taylors -- the first time PAE, excuse me, asserted the
5 idea that Taylors was the best value was in their
6 motion to dismiss. They argued -- they awarded -- they
7 competed the entire length of the contract, that there
8 wasn't a short-term and long-term award. Three weeks
9 later in the reply they say, Okay, maybe there was a
10 long-term and short-term award. Our long-term award
11 was relying on this price data that we just recently
12 compiled.

13 This is what differentiates this case from a
14 normal breach of contract. If PAE truly had a
15 reasonable and honest belief that Taylors was the best
16 subcontractor to provide the best value, they could
17 have told it. There would have been information that
18 supported that at the time when Mr. Garzione in
19 fulfilling his job duties is saying, There's all of
20 these cheaper prices out here, there's all of these
21 cheaper prices out here.

22 Certainly, by the time PAE is explaining its
23 actions to its attorneys in their motion to dismiss,
24 they would say, Well, here's why we call this a better
25 value. Instead, PAE has provided four different

1 explanations. I think that is a sort of *indicia* of
2 misrepresentations that indicate that the
3 misrepresentations were knowing.

4 If you get to that, if you get to that it's
5 knowing, then the idea that they're in actual
6 compliance or close enough to actual compliance
7 isn't -- now we're saying there are cheaper prices and
8 they're intentionally selecting a higher price.

9 THE COURT: How does your position differ
10 from the position that they had an obligation to take
11 the lowest facial price?

12 MR. JARRETT: Your Honor, we believe that the
13 bids were -- as alleged in the amended complaint, were
14 to provide all the services, compliant water, and the
15 water supply.

16 THE COURT: Doesn't your position necessarily
17 reduce to a position that they had the obligation to
18 pick the lowest price based on the initial round of
19 bidding?

20 MR. JARRETT: No, Your Honor. We believe
21 that they had to take the best value. We believe
22 that --

23 THE COURT: What's the measure of the best
24 value?

25 MR. JARRETT: I think that that would be

1 defined by factors such as -- the short answer is I
2 don't know. It --

3 THE COURT: That was a judgment PAE needed to
4 make.

5 MR. JARRETT: Yes, I agree. I think that the
6 way that they've --

7 THE COURT: That would include a whole range
8 of considerations, including that Taylors was already
9 logistically in place and all the other issues.

10 MR. JARRETT: Yes, Your Honor. I think that
11 if Taylors -- if PAE had said that at any point before
12 their motion to dismiss, that there wouldn't be a claim
13 and this would be a disagreement about breach of
14 contract. But that's not what happened. They told
15 four different justifications for why they gave to
16 Taylors and didn't come up with best value until a year
17 later when their attorneys were reviewing the file. I
18 think that's what differentiates this case.

19 THE COURT: Isn't there an allegation that
20 when Mr. Garzione first raised it, they said that they
21 were the best choice or something along those lines?
22 They were best suited? They were best suited for the
23 award?

24 MR. JARRETT: Yes, Your Honor.

25 THE COURT: Isn't that essentially saying all

1 the things we're talking about now?

2 MR. JARRETT: No, Your Honor. The defendant
3 takes that point and tries to draw an inference from it
4 against Mr. Garzione. Mr. Garzione, when he approached
5 his supervisors when he first found out about these
6 cheaper prices, said, Well, maybe -- in a somewhat
7 conciliatory manner said, Well, maybe we had to award
8 it for these reasons. Maybe they were best suited. I
9 can understand that. But now that we've got this long
10 four-year contract, I've got all of these cheaper
11 prices. Let's investigate. They didn't investigate.
12 Instead, they fired him.

13 THE COURT: Well, he wasn't a decision maker
14 on this procurement; was he?

15 MR. JARRETT: No. I believe he was
16 responsible for gathering the data for the decision
17 maker.

18 THE COURT: For other people to make. So he
19 wasn't part of the decision-making process or really
20 was privy to the internal thinking on the underlying
21 award.

22 MR. JARRETT: I think he was. No. I take
23 that back. I think -- I think he gathered the
24 information, and he informed the decision makers of all
25 of this information, of cheaper prices. They gave him

1 three inconsistent reasons why they shouldn't take it
2 and then stopped him.

3 THE COURT: All right. Anything else?

4 MR. JARRETT: No, Your Honor. If you have
5 any questions about materiality, particularity, or
6 retaliation, I'd be happy to answer them, but that's
7 all I've got.

8 THE COURT: All right. Thank you.

9 Anything further?

10 MR. WORKMASTER: Your Honor, the colloquy
11 just now, I think, has confirmed that this case is
12 nothing more than Mr. Garzione's mere subjective
13 disagreements with judgment calls that PAE made. It's
14 ironic, Your Honor, that Mr. Garzione is taking PAE
15 going above and beyond the requirements of competition
16 to the maximum practical extent.

17 As Your Honor focused us today, Taylors was
18 already under subcontract. When the government
19 awarded -- when the government expanded PAE's
20 obligations to include this bottled water, there wasn't
21 another competition. PAE would have been perfectly
22 within its rights to just expand the Taylors
23 subcontract. They had a judgment call to make there:
24 What is the maximum practical extent -- what is
25 competition to the maximum practical extent when you're

1 trying to supply water to Department of State sites in
2 a desert in Iraq? That is a relevant consideration
3 that could be taken into account. They could have
4 turned Taylors on under their existing subcontract at
5 that time. Instead of doing that, they did go out and
6 had a competition, got nine bids.

7 Your Honor, the short-term issue -- the
8 period of performance for that underlying task order
9 was ending at the end of November. So what happened
10 after November was that PAE had to go to the government
11 and submit a proposal for the next coming year. That's
12 when Taylors -- the water requirement was wrapped into
13 everything and wrapped into the Taylors subcontract at
14 that time. So to clarify that factual question that
15 Your Honor had.

16 On the -- Your Honor, on the question --
17 also, in the discussion that you were having with
18 relator's counsel -- again, this is a case involving
19 mere subjective disagreement, and we're disagreeing
20 over very mushy terms: What does it mean for there to
21 be a competition to the maximum practical extent? What
22 does best value mean? You asked the relator's counsel
23 that question. He said he doesn't know.

24 So we're here. Relator has brought this
25 complaint based solely on his mere subjective

1 disagreement. As Your Honor noted, in the complaint,
2 he acknowledges that during -- while he was still at
3 PAE, he was told, Look, we determined that they were
4 best suited.

5 As Your Honor pointed out, PAE was under
6 no -- they're saying all of this. PAE was under no
7 obligation at that time to tell Mr. Garzione exactly
8 why that determination had been made. It is not
9 surprising that it was only until after this case was
10 brought and Mr. Garzione has put us in the position of
11 having to file briefs on this issue, etc., that he's
12 learning more about what he did not know then. That's
13 not surprising.

14 One legal point, Your Honor. In the
15 discussion you were having with relator's counsel
16 about, you know, under FAR Part 31 there's no need for
17 a certification, there's also another False Claims Act
18 case out of the Northern District of Illinois. It is a
19 case that is cited in the *Howard* case, which I believe
20 both parties have discussed, but is a case -- *United*
21 *States ex rel. Watkins v. KBR*. The Westlaw cite is
22 2015 WL 2455533. In that case, Your Honor, the
23 district court -- excuse me -- Central District of
24 Illinois, May 22, 2015. In that case, Your Honor, the
25 district court dismissed or found that FAR Part 31 did

